

Electronic Regional Program Letter No. 2002-03

Date: October 25, 2002

To: Region V State Survey Agencies

Subject: Guidance on the Removal, Correction, and Documentation of Immediate Jeopardy

Appendix Q provides extensive guidance to CMS and the States to determine immediate jeopardy. This Electronic Regional Program Letter provides guidance to survey and certification personnel to determine how and when an immediate jeopardy (IJ) is removed versus corrected. This memo also provides additional instruction about documenting removal and correction of IJ. These instructions and guidance are for use in surveys of all providers and suppliers. Please note that we use the term, “removal”, instead of “abated” to be consistent with Appendix Q.

I. REMOVAL VERSUS CORRECTION.

First, there is a difference between removing an immediate jeopardy and attaining substantial compliance (correction of the noncompliance). A provider/supplier may have taken enough action to remove an immediate jeopardy, but non-compliance with that Federal requirement and/or another Federal requirement may remain, with the facility remaining not in substantial compliance. While that is one scenario, a provider/supplier may also take sufficient corrective action to both remove an immediate jeopardy and attain substantial compliance at the same time.

We believe that there may be situations in which an immediate jeopardy is removed before the facility has implemented all corrective actions to “fix the systems breakdown” which led to the immediate jeopardy. In order to state that the immediate jeopardy is removed, the real question is whether the remaining non-compliance is likely to cause serious injury, harm, impairment or death and whether any individual remains at immediate risk of serious injury, harm, impairment, or death. If the survey team cannot clearly state this to be the case and identify the person(s) at immediate risk, the IJ is likely removed.

Most immediate jeopardy is due to noncompliance in one or more of the following:

- process system failures (assessing, planning, implementing, evaluating),
- underlying structure system problems (records systems, supply systems, etc.),
- failure of leadership/management (philosophy, mission statement, planning, staffing, supervising, delegating, controlling, appraising staff performance),
- failure of quality assurance/risk management (assessing, planning, implementing and evaluating),

- lack of staff knowledge, skills, or motivation and,
- the level of immediacy and severity within immediate jeopardy. The severity and rapidity of harm IJ for a ventilator patient is usually greater than that for a beneficiary who may fall and break a hip while getting out of bed.

Immediate jeopardy removal is usually based on three factors:

- the scope of the problem -- fewer affected beneficiaries, involved staff, etc. usually makes prompt removal more feasible than a widespread problem,
- a reasonable, feasible and comprehensive plan of removal and,
- evidence that the plan is being implemented.

Immediate jeopardy can be removed by:

- removing the beneficiaries at risk,
- removing the direct threat (example #1),
- reducing the immediacy of the threat (example #2) or,
- reducing the severity of the threat (examples #3, 4 and 5).

Examples of removing beneficiaries include the closure of an under-staffed ICU in a rural hospital, or the transfer of all ventilator residents from a nursing home. In both cases, however, underlying deficient practices, which represent noncompliance, remain. For instance, if the deficient practice is the failure of licensed nurses to properly assess ventilator-dependent residents, simply transferring ventilator-dependent residents may remove residents at risk of IJ, but underlying assessment failures must be addressed to correct the noncompliance.

The series of examples in Appendix A demonstrate removal versus correction.

II. DOCUMENTATION REQUIRED FOR IMMEDIATE JEOPARDY DETERMINATIONS.

Section VII of Appendix Q in the State Operations Manual, and Principle #4 in the Principles of Documentation, and Appendix P – Task 6 both address documentation requirements for immediate jeopardy. However, we continue to see immediate jeopardy deficiencies that do not meet the documentation requirements. The following section clarifies documenting immediate jeopardy deficiencies.

A. Documentation Requirements that Pertain to All Surveyed Entities:

Appendix Q, Section VI, Implementation, instructs us to notify the facility verbally of the existence of the immediate jeopardy “...before the survey team leaves the premises of the entity.” The survey team must provide verbal notice to the entity of the existence of the IJ as soon as the IJ determination has been made (following consultation with and concurrence by the State office). Both this section of Appendix Q and other sections within the SOM state that notification of the IJ must be given to the entity by the second day and that the CMS-2567 must be released by the tenth working day. (See SOM §7309.A for nursing homes, and §3010 for other providers/suppliers for exact timeframes.)

However, neither of these sections of the SOM specify the format that is to be used in notifying the entity of the IJ. In cases where the IJ is removed by the end of the survey, the CMS-2567 is the method of documenting the IJ and notifying the provider within ten working days.

However, in situations in which the IJ remains in effect at the end of the survey, State agencies and CMS should document the existence of the IJ by one of the following methods within two days of the survey date:

- Documentation of the IJ on the CMS-2567; or
- Documentation of the IJ on the “Quick Report” via ASPEN.

If the “Quick Report” is used, the CMS-2567 containing all deficiencies must be released by the tenth working day.

B. SNF/NFs: Refer to Appendix Q, Section VII, Documentation, Subsection A:

At the time of a SNF/NF survey’s completion, an immediate jeopardy is considered to be either (A) not removed; (B) removed, but noncompliance continuing at a lower level of severity; or (C) removed and corrected.

1. Immediate Jeopardy Not Removed at the Survey’s Completion:

Clearly state the time and date that immediate jeopardy was identified during the survey. The evidence should also clearly state the date when the immediate jeopardy began, if it can be determined. This is in accordance with the Principles of Documentation, Principle #3 – discussion on findings...how, what, who, where and when. The statement of deficient practice must identify the practice(s) causing the immediate jeopardy and residents in the sample or outside the sample affected by the deficient practice(s) either at the immediate jeopardy level and at a lower severity level (if applicable).

The level of harm or potential harm to any residents not in immediate jeopardy should also be identified. The time and date and specific persons notified of the immediate jeopardy findings and their response should also be included. Any actions taken by the facility and the justification for the surveyors' determination of an ongoing jeopardy situation also need to be included.

For example, if the citation has two levels of severity:

“Based on ...resulting in immediate jeopardy to 1 of 12 sample residents (Resident #6) and actual harm for 4 of 12 residents.” The scope and severity of J would be included on the 2567.

If the facility developed a plan of correction (or an allegation of removal as permitted in SOM §7309.D), which addresses the removal of the IJ that they are unable to implement, the reason for the decision that a jeopardy situation still exists should be included by the surveyor.

2. Immediate Jeopardy Removed, but Noncompliance Continues at a Lower Severity Level:

An Immediate Jeopardy removed, but continuing noncompliance means that the deficient practice is no longer likely to cause serious harm, injury, impairment, or death, but facility noncompliance continues at a lower severity level.

The surveyor cites the deficiency as immediate jeopardy even though the immediate jeopardy is removed before the conclusion of the survey. The CMS-2567 should clearly state the date and time the immediate jeopardy was identified, the date it began (if determination is possible), and the date it was removed. Documentation should include the date, time, and specific title (or other identifier) of the person(s) notified of the jeopardy situation. The HCFA-2567 should include information about what the facility did to remove the immediate jeopardy, confirmed by surveyor observation or record review, such as: “The surveyor confirmed that the facility implemented the following to remove the immediate jeopardy which reduced the scope and severity to *(use the language rather than a letter from the grid)*.”

Since noncompliance is continuing, but not an immediate jeopardy, the CMS-2567 should state in the deficient practice statement that, while the immediate jeopardy was removed on (date), the facility remained out of compliance at the lower severity level. The reason(s) why the deficient practice remains uncorrected but the IJ was removed should be provided, e.g., “not all staff have been trained or side rails fixed.”

3. Immediate Jeopardy Removed and Corrected at the Survey’s Completion:

The deficiency is cited as Immediate Jeopardy even though it is found to be removed and corrected at the survey’s completion. The CMS-2567 should clearly state the date and time the immediate jeopardy was identified, the date it began (if determination is possible), and the date it was removed. Documentation should include the date, time, and specific title (or other identifier) of the person(s) notified of the jeopardy situation. The surveyor needs to document onsite verification in the CMS-2567 of what the facility did to remove the jeopardy and correct the deficient practice. Even though compliance is attained at the time of the survey, the facility will be required to submit an acceptable Plan of Correction, which must include how the facility will monitor to prevent recurrence. Upon receipt of the POC, the SA will complete a CMS-2567-B to reflect correction of the deficiency as of the date of the POC submission.

C. All Entities Other than SNF/NFs: Refer to Appendix Q, Section VII, Documentation, Subsection B:

1. Immediate Jeopardy Not Removed at Survey Completion:

As stated on page Q-17 of Appendix Q, cite the IJ at the Condition of Participation (COP) level. Clearly state the time and date that immediate jeopardy was identified during the survey. The evidence should also clearly state the date when the immediate jeopardy began, if it can be determined. This is in accordance with the Principles of Documentation, Principle #3 – discussion on

findings...how, what, who, where and when. The statement of deficient practice must identify the practice(s) causing the immediate jeopardy and patients/clients in the sample or outside the sample affected by the deficient practice(s) either at the immediate jeopardy level or at a lower severity level.

The time and date and specific persons notified of the immediate jeopardy findings and their response should also be included. Any actions taken by the facility in an attempt to remove the IJ and the evidence for the surveyors' determination of an ongoing jeopardy situation also need to be included.

2. Immediate Jeopardy Removed, but Noncompliance Continues at the Condition Level:

This means that the deficient practice is no longer likely to cause serious harm, injury, impairment, or death, but the facility continues in noncompliance at the Condition of Participation level.

Under these circumstances, cite the Condition of Participation as not met. The deficiency is cited as an immediate jeopardy even though the immediate jeopardy was removed before the conclusion of the survey. The CMS-2567 should clearly state the date and time the immediate jeopardy was identified, the date it began (if determination is possible), and the date it was removed. Documentation should include the date, time, and specific title (or other identifier) of the person(s) notified of the jeopardy situation. The CMS-2567 should include information about what the facility did to remove the immediate jeopardy, confirmed by surveyor observation or record review, such as: "The surveyor confirmed that the facility completed the following to remove the immediate jeopardy." The surveyor documents the steps taken to remove the IJ.

Since noncompliance is continuing at the Condition Level, but not an immediate jeopardy, the CMS-2567 should state in the deficient practice statement that "while the immediate jeopardy was removed on (date), the facility remained out of compliance at the Condition level." The reason(s) why the deficient practice remains uncorrected even though the IJ was removed should be provided, e.g., "not all staff have been trained" or "the new drug delivery system has been received, but has not been implemented on all shifts to date."

3. Immediate Jeopardy Removed, Condition is corrected and Compliance at the Condition Level achieved. Deficient Practice May or May Not Continue at the Standard or Element Level:

This means that the deficient practice is no longer likely to cause serious harm, injury, impairment, or death, and the removal of the IJ also results in compliance at the Condition level. The facility may (or may not) have deficient practice(s) that continue at the Standard or Element Level.

Under these circumstances, cite the IJ at the Condition Level. The Condition level deficiency is cited as an immediate jeopardy even though the immediate jeopardy was removed and compliance with the COP was achieved before the conclusion of the survey. The CMS-2567 should clearly state the date and time the immediate jeopardy was identified, the date it began (if determination is possible), and the date it was removed/corrected. Documentation should include the date, time, and specific title (or other identifier) of the person(s) notified of the jeopardy situation. The CMS-2567 should include information about what the facility did to remove the immediate jeopardy, confirmed by surveyor

observation or record review, such as: “The surveyor confirmed that the facility completed the following to remove the immediate jeopardy and achieve compliance with the Condition of Participation.”

Cite any remaining deficiencies at the appropriate Standard or elemental tag. Even though compliance was attained at the time of the survey, the facility will be required to submit an acceptable Plan of Correction (must include how the facility will monitor to prevent recurrence) to the Condition level deficiency. Upon receipt of the POC, the SA will complete a CMS-2567-B to reflect correction of the Condition level deficiency (and any other deficiencies) as of the date of the POC submission.

If you have any questions about this information, please contact your program representative.

Jerry L. Sandlin
Survey Improvement Branch

**APPENDIX A:
EXAMPLES OF IMMEDIATE JEOPARDY
REMOVAL VERSUS CORRECTION**

The following examples are intended to provide general guidance. Please note the identification and removal of immediate jeopardy is always dependent upon a specific set of circumstances that change from one situation to the next. We caution over-generalization of these examples. We strongly urge you to contact the Regional Office to discuss specific cases.

Example #1: Nursing Facility: Resident A has a mental illness and has been known to become highly aggressive toward other residents. The facility is aware of his behavior and has implemented a care plan that has proved to be insufficient to control the behaviors in the recent past. On March 1, Resident A physically attacks Resident B, throwing her to the floor. Resident B receives a serious head injury, is transferred to the hospital immediately, where she dies from her injuries on March 2. An immediate jeopardy clearly exists. In response, on March 2, the facility transfers Resident A to a psychiatric hospital for evaluation and treatment. As of March 2, the facility assessed that no other residents reside in this facility who exhibit these aggressive behaviors towards others. The facility submits a plan of removal/correction indicating that they: transferred Resident A on March 2; will provide comprehensive training to staff on dealing with aggressive resident behaviors by March 13; will develop policies and procedures on the subject by March 13; and will contract with a psychiatrist for the provision of consultation on the subject when needed in the future by March 13. In this example, the IJ began on March 1 and was removed when Resident A was transferred to the hospital on March 2.

Why? Because the removal of Resident A as the only aggressive resident removed the imminent likelihood that other residents would be seriously injured by another resident. As of March 2, no resident has been or is likely to be seriously injured, harmed, impaired, or killed in the immediate future. Is the facility in substantial compliance on March 2? No. The potential still exists for the facility to admit another aggressive resident and place other residents in jeopardy. In order to attain substantial compliance and ensure that the system, which allowed the immediate jeopardy situation to surface in the first place will not recur, the facility must implement the remainder of its plan of correction.

Example #2: Hospital. A Life Safety Code (LSC) survey of May 15 reveals that the hospital's fire detection and alarm system is malfunctioning. There have been no fires at the facility in the past two years. The hospital was not aware of the failure of the system until the survey revealed the noncompliance and has taken no corrective action. The SA calls an immediate jeopardy effective May 15th. In response, the facility submits a plan of removal/correction and alleges that the IJ is removed effective May 18th, at which time the facility called for repairs and instituted a fire watch with additional staff making rounds every hour. The local fire authority visited the facility to inspect the building, approved the fire watch/emergency plan, participated in an in-service for all staff on the fire/emergency plan, and conducted fire drills on all shifts. The local fire authority approved these corrective actions and indicated it would continue monitoring until the facility repaired its fire alarm system. During a revisit to the facility on May 20th the SA determined that the IJ was removed May 18th, but that the facility remained out of compliance at the Condition of Participation level until the fire alarm system gets repaired.

Why? Because the institution of these preventive measures provided an alternative level of safety pending complete correction of the malfunctioning fire alarm system. These preventive measures removed the imminent likelihood of serious injury, harm, impairment, or death. However, a facility with a malfunctioning fire alarm system is not in compliance with the LSC.

Example #3: ICF/MR. During evening observations on June 23rd, Client #3 was observed sitting in a chair in the dayroom on Hall B engaging in self-injurious behaviors. Client #3 repeatedly hit herself in her right eye. The one staff in the dayroom was working with another client and did not observe this behavior. Record review revealed that this client had a detached retina six months prior due to self-injurious behaviors and that her behaviors could result in her becoming blind. A behavior program indicated that staff was to immediately intervene when this behavior was observed. When interviewed, the direct care staff who was in the dayroom stated, "I can't do everything, there just isn't enough staff here to watch everyone". An immediate jeopardy was called on June 23rd. In response, on June 23rd, the facility assigned a 1:1 staff with Client #3 to monitor and prevent the self-injurious behaviors; initiated the process to obtain consultation from a psychologist with expertise in self-injurious behaviors; amended the client's individual program plan to provide for the 1:1 supervision; and initiated in-service education for all staff who work with Client #3 to ensure that they were aware of his/her special needs. This was their plan of removal. A plan of removal/correction was subsequently provided which included all of these actions, including provisions for a revised behavior modification program to more appropriately address the behavior. The survey team observed the 1:1 staffing in place and being effective in protecting the client on June 23rd. The IJ was determined to be removed on June 23rd because the facility had provided protection to Client #3, which removed her from risk of immediate harm. However, the facility remained out of compliance at the Condition of Participation level until it took corrective action to more adequately address Client #3's self-injurious behavior and assure adequate staffing for all clients.

Example #4: SNF/NF. Resident 1 is a 76 year-old female with diagnosis of dementia, severe cognitive impairment and depression. Resident 1 was found to be an elopement risk two days after admission to facility. She resided in the secured dementia unit of the facility, along with ten other residents who were at risk of elopement. Resident 1's care plan required for 15-minute checks and 1:1 supervision. On March 1, Resident 1 was found dead outside of the facility on the grass beneath her window. Resident 1 apparently tied sheets together, put them through an 8-12 inch opening in her window (windows opened outward), climbed out of the window while holding the sheets, slipped and fell to her death. The State conducted a complaint investigation on March 2nd. A review of resident rooms on the cognitive impairment unit indicated that all resident room windows had an 8-12 inch opening, through which a person could climb or entangle a limb. On March 2nd, the State called an immediate jeopardy effective March 1. On March 2nd, maintenance staff installed safety latches to allow the window to open no more than 3-4 inches at a time, which still allowed for ventilation of the rooms, and implemented a preventive maintenance system for monitoring the window safety latches. The jeopardy began on March 1 and was considered removed and corrected effective March 2nd.

Example #5: Hospital. A complaint survey on May 15th revealed that Patient #1 had an order dated May 1 for Dilaudin 1mg/cc via PCA controlled pump. When his pump became empty on May 5th, the nurse changed the bag from the pharmacy box cart, not checking the dosage or name. The patient was found unresponsive, with no respiration and no pulse almost 12 hours later. The patient had received another patient's medication, which was 5 times the amount ordered.

Pt. #2 had an order for Heparin Sodium 5,000 units subcutaneously twice daily. On May 7th, the nurse transcribed an order for Acetaminophen 800mg 3 times a day. The patient received this medication along with the Heparin beginning on May 7th for three days before the error was caught by another nurse. The patient started having multiple site bleeding and abnormal labs.

When interviewed concerning these incidents, the nurses involved stated that on the dates of these two incidents, they had both worked short staffed with only an aide and no unit secretary. The surveyor had confirmed through staffing patterns that the units were understaffed on the dates in question and were consistently understaffed on all three shifts. The lack of staffing was later confirmed with hospital administration. Hospital management confirmed that the minimum staffing level for these units should be 2 nurses, a nurse's aide and a unit secretary on each shift. The hospital had not identified the reasons for the medication errors and taken steps to correct the problem of insufficient staffing.

On May 15th, an IJ was called (beginning on May 7th) based on the medication errors and the lack of adequate and timely response by the hospital. The survey ended on May 15th. On May 16th, the hospital submitted an allegation of compliance that they had removed the IJ and attained compliance by reassigning nurses to all units to ensure that each unit was staffed with at least 2 nurses, a nurse's aide, and a unit secretary at all times. (This included some supervisors working the units until more nurses could be hired and trained.) The Plan of Correction (POC) also included provisions for placing ads in the newspaper to hire more nurses; in-service training on medication administration was scheduled to be completed for all nursing staff by May 19th; and quality monitoring of medication administration was initiated on May 16th. In this example, the survey ended before the IJ had been removed by the hospital. On revisit to the hospital on May 29th, the IJ was determined to be removed as of May 19th, because adequate staffing was determined to be on duty during this interval, the facility had hired some new nursing staff as a result of its recruitment efforts, and staff training had been completed. However, due to the use of overtime in this interval, the SA concluded that, while the IJ was removed, the facility remained out of compliance with the COP until recruitment had resulted in a full staff of qualified nurses to fully staff the hospital without excessive use of overtime.